United States Court of Appeals

for the Second Circuit

APPELLANT'S PETITION FOR REHEARING EN BANC

Corrected Copy

77-2053

UNITED STATES COURT OF APPEALS

For the Second Circuit

Docket No. 77-2053

JOHN SUGGS,

Petitioner-Appellee,

against

J. EDWIN LaVALLEE, Superintendent,
Clinton State Correctional Institution,

Respondent-Appellant.

On Appeal from the United States District Court for the
Southern District of New York

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PETITION OF RESPONDENT-APPELLANT FOR REHEARING AND
AND SUGGESTION FOR REHEARING IN BANC

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Preliminary Statement

The People of the State of New York respectfully petition for rehearing, and suggest rehearing in banc, of the decision of a panel of this Court filed January 27, 1978 (slip. op. p. 1323). In an opinion by Oakes, J. (at pp. 1323-76), concurred in by Kaufman, Ch. J. (with opinion at pp. 1377-78) and Meskill, J., the panel affirmed an order, entered April 6, 1977, in the Southern District of New York (DUFFY, J.), which granted a petition for a writ of habeas corpus by petitioner-appellee John Suggs, a state prisoner.

Suggs pleaded guilty to RAPE IN THE FIRST DEGREE and ROBBERY IN THE FIRST DEGREE in New York State Supreme Court on September 13, 1968. He was sentenced on June 6, 1969, to five to fifteen years' imprisonment, which he is presently serving. Before sentence was imposed, Suggs, who was represented by counsel, personally assured the sentencing judge that he had decided not to request withdrawal of his guilty pleas on the basis that he was incompetent at the time of his pleas.

On the State's prior appeal from a previous grant of the writ by the District Court, 390 F. Supp. 383 (1975), a panel of this Court (Feinberg, Timbers and Van Graafeiland, J.J.) did not reach the question of whether the District Court was correct in ruling that Suggs could seek federal habeas relief on a claim of incompetency at plea even though he had assured the state court prior to sentencing that he had decided not to pursue that claim. Rather, that panel reversed and remanded for an evidentiary hearing on the issue of Suggs' competency at the time he pleaded guilty, the hearing to be held in the state or federal court as the District Court should determine. 523 F. 2d 539 (1975).

The District Court decided that a hearing should be held in the state court. 400 F. Supp. 1366 (1975). The state Supreme Court (MELIA, J.) then held an evidentiary hearing and determined that Suggs was competent when he pleaded guilty. The state court also held that Suggs had ratified the pleas at the time of sentencing. The District Court then decided to treat the state court's decision as a nullity and to hold a

hearing itself. 422 F. Supp. 1042 (1976). After holding a hearing, the District Court decided that Suggs was incompetent when he pleaded guilty, and directed that the writ issue in sixty days unless Suggs is permitted to replead in state court within that time. A stay was granted pending appeal.

Judge Oakes' opinion for the panel, after discussing in detail the evidence at the state and federal hearings on the issue of competency, rejected the state's first point that the District Court should have followed the state court's determination of the competency issue. Judge Oakes then turned, in Part IIIB of his opinion, (slip op. pp. 1369-76), to the other question raised by the state on appeal: whether Suggs is entitled to federal habeas corpus review of his claim of incompetency at plea even though he assured the state judge at sentencing on June 6, 1969, when he was competent and represented by counsel, that he had decided not to pursue that claim. It is with respect to this latter question that rehearing and in banc consideration are sought.

Statement of the Case

On September 13, 1968, after an extensive plea colloquy, state Supreme Court Justice Emilio Nunez accepted Suggs' plea of guilty to one count of Rape in the First Degree and one count of Robbery in the First Degree. The plea covered charges of rape, sodomy and robbery of three women, robbery of two other women, and felonious assault upon a police officer. After accepting the pleas, Justice Nunez questioned Suggs

further about his crimes. Justice Nunez then set a date for sentencing and requested a psychiatric report.

On November 6, 1968, on the basis of a report of two psychiatrists at Bellevue Hospital, dated October 21, 1968, that Suggs was not competent, state Supreme Court Justice Samuel Gold, on motion of Suggs' counsel and upon consent by the People, ordered Suggs committed to Matteawan State Hospital.

In April 1969, Suggs was certified as competent by Matteawan authorities. On May 20, 1969, Dr. Emanuel Messenger, after a further psychiatric examination, reported that Suggs was not psychotic and diagnosed him as a sociopathic personality. The report noted that Dr. Messenger had made a similar diagnosis in July 1968.

Faced with sentencing on his guilty pleas of September 13, 1968, Suggs considered the alternative of withdrawing his pleas on the ground of incompetency. A new attorney was appointed rather than a Legal Aid attorney, who might have had a conflict of interest on a motion to withdraw the pleas since they were entered when Suggs was represented by a Legal Aid attorney. The sentencing was adjourned so that Suggs' new counsel would have time to "formalize" an application to withdraw the pleas (Mins. of Sentencing, June 6, 1969, 27a-28*).

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*Page references followed by "a" are to the Joint Appendix.

It is undisputed that, if Suggs had proceeded to request withdrawal of his guilty pleas prior to sentencing, that application would have been granted (see slip op. p. 1372). But, Suggs changed his mind about withdrawing his guilty pleas. In advance of the adjourned sentencing date, Suggs' counsel informed the court that Suggs had abandoned his plan to withdraw his guilty pleas, and that he wanted to accept sentence on the pleas (Mins. of Sentencing, 28a).

On June 6, 1969, Suggs was arraigned for sentence on his pleas of guilty to Rape in the First Degree (Ind. No. 3063) and Robbery in the First Degree (Ind. No. 3063A). Suggs personally informed the court that, while he believed he was incompetent when those guilty pleas were entered, he had decided that he did not want to withdraw those pleas (id., 27a-29a). The court invited Suggs, "so we will have no misunderstanding either at this time or in the future " (id, 29a), to take an adjournment of the sentencing in order to confer again with his attorney about withdrawing his guilty pleas. Suggs personally declined this opportunity to adjourn his sentencing and to give further consideration to the alternative of withdrawing his plea. He stated, "I wish to be sentenced today" (id, 29a).

In response to the court's question, Suggs then personally assured the court that it could assume that "after conferring with [his] lawyer [Suggs] no longer planned to withdraw [his] pleas of guilty" (Sentencing Mins, 29a). Suggs

then stated that there was no reason why judgment should not be pronounced against him on his guilty pleas to the rape and robbery charges (id, 29a). His counsel, stating that Suggs "is throwing himself on the mercy of the Court" (30a), made a plea for leniency, and sentence was imposed.

In these circumstances, the State's position has been that Suggs is not entitled to federal habeas corpus relief from his pleas on a claim of incompetency because Suggs had assured the state count at sentencing that he had abandoned that claim. On this appeal, State relied on the recent decision in Wainwright v. Sykes, _____U.S._____, 97 S. Ct. 2497, 53 L.Ed. 2d 594 (June 23, 1977), which limited the availability of federal habeas relief for claims not raised prior to conviction in the state courts. The State also relied upon the principle (criticized in Wainwright) of "deliberate bypass" enunciated in Fay v. Noia, 372 U.S. 391, 439 (1963).

In concluding that principles of waiver and ratification did not warrant denial of federal habeas relief, Judge Oakes' opinion for the panel relied on Boykin v. Alabama, 395 U.S. 238 (1969). Judge Oakes concluded that the District Court could consider Suggs' claim of incompetency at plea because, if it were determined that Suggs was not competent at the plea, then the plea colloquy which took place at that time would be a nullity and could not satisfy Boykin. The later colloquy at the sentencing could not satisfy Boykin, Judge Oakes concluded, because there was no inquiry at that time into the voluntariness

or the factual basis of the earlier pleas. The claim that the colloquy at sentencing was inadequate under Boykin was not waived by Suggs' failure to raise that claim at sentencing. Thus, Judge Oakes concluded, Suggs could litigate the question of his competency at plea in connection with his claim under Boykin that there was no adequate colloquy at a time when he was competent.

Reasons for this Petition

The panel's decision in this case should be re-heard, preferably by an in banc court. The extent to which federal habeas relief should be available to a state prisoner who has abandoned his claim in state court prior to conviction is one of the major issues facing the federal courts.

The panel's decision permits a state prisoner to litigate in a federal habeas proceeding a claim of incompetency even though it was the defendant's personal, counselled and strategic decision to assure the state court prior to sentencing that he would not pursue that claim. This is a classic case of waiver of the claim of incompetency for purposes of federal habeas review. Accordingly, under the principle of waiver, there is no basis for a federal habeas court to treat as a nullity the colloquy at the time of the plea, which was more than adequate for Boykin purposes even though it preceded the Boykin decision.

The important question presented by this case is whether a claim of incompetency that was clearly waived in the state court may nevertheless be litigated in a federal habeas proceeding on the theory that, if incompetency is established, then there was no time at which the colloquy required by Boykin was conducted. It is respectfully submitted that, in view of the unsettled state of the law with respect to the scope of waiver in federal habeas proceedings, rehearing by the full Court should be considered.

ARGUMENT

The Panel's Decision Is Incorrect

The panel's decision that Suggs could litigate his claim of incompetency at plea in a federal habeas proceeding did not give sufficient recognition to the role of waiver in federal habeas review. The case for waiver here is a particularly strong one for several reasons. First, Suggs, at a time when he was competent and represented by counsel, personally assured the state court prior to sentencing that he had decided not to pursue a claim of incompetency at plea. At that time the sentencing judge would have permitted Suggs to withdraw his pleas and stand trial thus avoiding the necessity of litigation over the issue of competency which might require trial years later after appeal and collateral attack. Nevertheless, Suggs decided not to withdraw his plea.

Second, the reason for Suggs' decision not to withdraw his guilty plea in June 1969 was clearly strategic. At that time, the crimes he was charged with were only about a year old. If he had withdrawn his guilty plea, he would have faced trial on six separate sets of crimes, including rape, sodomy and robbery of three women, robbery of two other women, and felonious assault on a police officer. If convicted, he would have been subject to heavy punishment after the court had heard live testimony from his victims. In these circumstances, Suggs, after conferring with counsel, personally decided to reject the alternative of going to trial and instead chose the alternative of "throwing himself on the mercy of the Court" (30a), as his attorney put it in pleading for a lenient sentence on the two felony counts to which he had pleaded guilty.

Third, the passage of time since June 1969 has changed the nature of the relief Suggs will receive if his claim of incompetency at plea is now accepted in federal habeas corpus. Years later, putting Suggs on trial would be fraught with difficulty, if not impossible. In these circumstances, vacating his guilty plea would very likely lead to dismissal of all or most of the charges, not merely to the alternative of standing trial which Suggs rejected in 1969. Even if trial were possible, to require the victims of these brutal crimes to relive their experiences on the witness stand after so many years, is surely a consideration of some weight where Suggs himself chose not to go to trial when the charges were still fresh.

For a federal habeas court to vacate a guilty plea on a claim which, years before when faced with sentencing on that plea, the defendant solemnly assured the state court he had abandoned, would be to encourage "sand bagging" on the part of defendants and their lawyers. If federal habeas relief is available in such circumstances, defendants may take their chances on light sentencing in the state court and, if that gamble does not pay off, attack their guilty pleas in federal habeas court some years later when the chances of their being convicted after trial have decreased markedly. Cf. Wainwright v. Sykes, supra, 53 L. Ed. 2d at 609.

Furthermore, the passage of time since June 1969 has made the question of competency at plea substantially more difficult to determine. Years later, the recollections of the judge, defense attorney and prosecutor who participated in the plea, and of the psychiatrists who examined Suggs shortly before and after the plea, were understandably limited and therefore of considerably less value in resolving the issue of competency.

Thus, this is a much stronger case for application of the principle of waiver than, for example, United States ex rel. Callahan v. Follette, 418 F. 2d 903 (2d Cir. 1969), cert. denied, 400 U.S. 840 (1970), where the principle of waiver led this Court to reject a federal habeas corpus claim made by a state prisoner that his guilty plea was invalid because of a sentence "promise" made by defense counsel:

> Callahan must be held to have waived any objection to the plea by his failure to take the opportunity offered by the judge for a formal motion and determination of his request for withdrawal. 418 F.2d at 904-905.

Suggs did not merely fail to make a formal motion to withdraw his guilty plea after the sentencing judge gave him time to do so. Represented by counsel who had no conflict of interest problem (unlike Callahan's attorney), Suggs explicitly assured the sentencing judge that he had decided not to pursue his claim of incompetency at plea. And, he did so after the sentencing judge, unlike the judge in Callahan who had denied the oral request to withdraw the plea, had indicated that he would grant a motion to vacate Suggs' plea if such a motion were made.

In sum, under the principle of waiver, Suggs should not be permitted to litigate in a federal habeas proceeding a claim of incompetency at plea which, prior to sentencing years earlier, he assured the state court he would not pursue. Since his attack on the pleas on competency grounds should not be considered, Boykin v. Alabama, supra, does not require that federal habeas relief be granted here.

Conclusion

The petition for rehearing and *in banc* consideration should be granted and, upon rehearing, the order of the District Court should be reversed and petitioner's application for writ of habeas corpus should be dismissed.

Respectfully submitted,

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